Supreme Court, U.S.
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No. 04-175

IN THE

Supreme Court of the United States

JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,

Petitioner,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, and LOUIS F. MANN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is applicable to New York Election Law § 5-106, which disenfranchises New York residents who were convicted of a felony and are either in prison or on parole.

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STATEMENT OF THE CASE

Petitioner Jalil Abdul Muntaqim is an African-American male in the custody of the New York State Department of Correctional Services. He was convicted of two counts of murder and is currently serving an indeterminate term of imprisonment of twenty-five years to life at a New York State correctional facility.

Petitioner commenced this action pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, that New York Election Law § 5-106, which disenfranchises New York residents incarcerated for a felony,[1] violates the Voting Rights Act ("VRA") because it "results in the denial or abridgement of the right . . . to vote on account of race." 42 U.S.C. § 1973(a). He seeks this Court's review of a decision of the United States Court of Appeals for the Second Circuit, which dismissed his claim on the ground that the VRA does not apply to New York's felon disenfranchisement law.

The Second Circuit held that application of the VRA to New York's felon disenfranchisement law would alter the traditional balance of power between the states and the federal government in the realms of state criminal and election law. Pet. App. 34a-35a. The court highlighted the "longstanding practice in this country of disenfranchising felons as a form of punishment," Pet. App. 36a; *see also* Pet. App. 3a, 37a, evidenced in part by the practice's express exemption from the sanction of reduced representation for abridgement of the right to vote imposed by Section 2 of the Fourteenth Amendment. Pet. App. 35a-36a. Applying the interpretive principle of

1. Consistent with the Second Circuit's decision below, Pet. App. 7a n.7, we use the term "incarcerated felon" to refer to a person convicted of a felony and either in prison or on parole. We use "ex-felon" to refer to a person convicted of a felony who has completed his or her sentence.

Gregory v. Ashcroft, 501 U.S. 452 (1991), the court found no "clear statement in the language of § 1973, or . . . its legislative history" indicating that Congress intended to prohibit a felon disenfranchisement law such as New York's. Pet. App. 22a. In the absence of a sufficiently clear statement of congressional intent, the court read § 1973 not to cover New York's felon disenfranchisement law. Pet. App. 22a, 47a.

Petitioner did not seek rehearing *in banc*. The Second Circuit, however, conducted a poll *sua sponte* as to whether to do so, which failed. *Muntaqim v. Coombe*, No. 01-7260, 2004 U.S. App. LEXIS 20619 (2d Cir. Oct. 1, 2004) (denial of reh'g *in banc*). In concurring and dissenting opinions, a majority of the active judges of the court indicated an interest in rehearing the case *in banc* if review by this Court is denied. *Id.* at *5 (opinion of Straub, Pooler, Sack and Katzmann, Circuit Judges, concurring); *id.* at *6 (opinion of Calabresi, Sotomayor, B.D. Parker, Circuit Judges, dissenting); *see also id.* (opinion of Jacobs, Circuit Judge, dissenting) (noting that "a majority now expresses — or signals — an interest in hearing this appeal *in banc*").

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant certiorari to resolve a purported conflict between the Second Circuit's decision and decisions of the Eleventh and Ninth Circuits, *see Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), *vacated and reh'g en banc granted*, 377 F.3d 1163 (11th Cir. July 20, 2004); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *petition for cert. filed, Locke v. Farrakhan*, 72 U.S.L.W. 3741 (U.S. May 24, 2004) (No. 03-1597), as well as an "implicit" conflict with decisions of the Fourth and Sixth Circuits, *see Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished table decision); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986),

regarding the applicability of the Voting Rights Act to felon disenfranchisement laws. Pet. at 10-11. Petitioner also asks the Court to grant certiorari to revisit the principles of the plain statement rule set forth in *Gregory v. Ashcroft*, 501 U.S. 452. Pet. at 13-16.

Petitioner's reasons are not compelling. There is no square conflict among the circuits regarding the VRA's applicability to felon disenfranchisement laws. The New York statute reviewed by the Second Circuit disenfranchises only incarcerated felons, while the laws at issue in the other cases relied upon by Petitioner disenfranchise *both* incarcerated *and* ex-felons. As Judge Cabranes, the author of the Second Circuit decision below, pointed out in his concurrence to the denial of rehearing *in banc*, the disenfranchisement of incarcerated felons "presents a significantly narrower legal and policy issue" than that of ex-felons. *Muntaqim*, 2004 U.S. App. LEXIS 20619, *1. The difference is significant because applying the VRA to laws that disenfranchise ex-felons will not alter the federal-state balance of power over criminal matters to the same degree as would its application to laws that disenfranchise incarcerated felons. The state's penological interest in more sweeping disenfranchisement is weaker, and ex felons' voting rights are stronger.

As to the Second Circuit's reliance on the plain statement rule, that doctrine is settled, and its application by the Second Circuit does not warrant review by the Court.

Additionally, this case presents a particularly poor vehicle for certiorari because the Second Circuit has indicated a desire to rehear its decision *in banc* if certiorari fails, *see Muntaqim*, 2004 U.S. App. LEXIS 20619, suggesting that it may well revisit these issues absent any intervention by this Court. The case was correctly decided and certiorari should be denied.

1. There is no split of authority among the circuits warranting review by this Court. As a preliminary matter, the decision of the Eleventh Circuit has been vacated pending *en banc* review by that court, and the decisions of the Sixth Circuit (which is almost twenty years old) and the Fourth Circuit (which is unpublished) did not even consider whether the VRA applies to claims of felon disenfranchisement. That leaves only the decision of the Ninth Circuit. There is no true conflict between that ruling and the Second Circuit's, however, because the New York felon disenfranchisement law differs in relevant respect from its counterpart in Washington, as well as from the laws in Florida (*Johnson*), Tennessee (*Wesley*), and Virginia (*Howard*).

a. In *Johnson v. Governor of Florida*, the Eleventh Circuit held in a footnote that Section 2 of the VRA can be extended to Florida's felon disenfranchisement law. 353 F.3d at 1306-07 n.27. In response to a strongly-worded dissent by Judge Kravitch arguing that application of the VRA to Florida's felon disenfranchisement law would conflict with Section 2 of the Fourteenth Amendment, *id.* at 1314-18, the panel held that Section 2 permits states to disenfranchise convicted felons only in a racially neutral manner, "that is, in a manner that is neither racially motivated nor produces racially disproportionate effects," *id.* at 1306-07 n.27.

Any conflict that might have existed between the Eleventh Circuit's decision in *Johnson* and the Second Circuit's decision below, however, has been eliminated by virtue of a July 20, 2004, order of the Eleventh Circuit granting rehearing *en banc* and vacating the previous panel's opinion. *Johnson*, 377 F.3d 1163.

b. Nor is the Second Circuit's decision inconsistent with the Sixth Circuit's decision in *Wesley*, 791 F.2d 1255, or the Fourth Circuit's decision in *Howard*, 205 F.3d 1333, as neither the Sixth nor the Fourth Circuit actually addressed whether the VRA applied to the felon disenfranchisement laws at issue. Moreover, both of these courts reached the same result as the Second Circuit: dismissal of the plaintiffs' VRA challenges to state felon disenfranchisement laws for failure to state a claim upon which relief can be granted.

In *Wesley*, the Sixth Circuit dismissed the plaintiffs' challenge to Tennessee's felon disenfranchisement law after concluding that plaintiffs had not stated a claim for a violation of Section 2 of the VRA. *Wesley*, 791 F.2d at 1261. *Wesley* did not expressly consider whether the VRA applied to the challenged law. Instead, the court reviewed the "totality of the circumstances," the standard for assessing a Section 2 violation, and concluded that dismissal was appropriate based principally on "the state's legitimate and compelling rationale for enacting the statute." *Id.* at 1260-61.[2] *Wesley* also observed that the voting bar "does not deny any citizen, *ab initio*, the equal opportunity to participate in the political process and elect candidates of their choice. Rather, only the commission of a preascertained, proscribed act warrants the state . . . to foreclose a certain individual from the voting process." *Id.* at 1262. Because the court dismissed the claim as a matter of law, it did not need to address the constitutional issues raised in this case. Nor would it have, since *Wesley* was

2. The Sixth Circuit cited Section 2 of the Fourteenth Amendment; this Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974); and a rationale for felon disenfranchisement based on Locke's social contract theory set forth in *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968). *Wesley*, 791 F.2d at 1261.

decided almost 20 years ago, before relevant developments in this Court's constitutional jurisprudence, including its decision in *Gregory v. Ashcroft*.

The Fourth Circuit's analysis of Virginia's felon disenfranchisement law in *Howard*, 205 F.3d 1333, an unpublished opinion, is scant. Relying on the Sixth Circuit's decision in *Wesley*, the court simply held that the plaintiff in that case "failed to plead any nexus between the disenfranchisement of felons and race." *Id.* As in *Wesley*, there was no need for the court to address the issue of the applicability of the VRA to the felon disenfranchisement law because the plaintiff's claim fell on other grounds. In any event, the decision is unpublished and therefore has limited precedential value. *See* Rule 36(c) of the Local Rules of the Fourth Circuit.

c. The only federal appellate decision expressly holding that the VRA provides a basis to challenge a felon disenfranchisement law is the Ninth Circuit's decision in *Farrakhan*, 338 F.3d 1009. Even if the Second Circuit had not indicated its willingness to consider further review of the decision below, any split would be extremely shallow, and intervention by this Court thus unwarranted. More importantly, as examination of the state law at issue in each case demonstrates, even that conflict is not a genuine one.

In *Farrakhan*, the court began its analysis of whether the VRA applies to Washington's felon disenfranchisement law by holding, in perfunctory fashion, that plaintiff's claim of vote denial was "cognizable" under the VRA, stating that "[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates

the VRA." *Id.* at 1016. It attempted to accommodate this Court's holding in *Richardson v. Ramirez* by explaining that "[a]lthough states may deprive felons of the right to vote without violating the Fourteenth Amendment, . . . when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress." *Id.*

The state felon disenfranchisement law at issue in *Farrakhan* — like the state laws considered by the Fourth, Sixth and Eleventh Circuits — deprives both incarcerated and ex-felons of the right to vote.[3] New York's felon disenfranchisement statute, in contrast, is significantly less restrictive in that it disenfranchises only incarcerated felons, that is, felons in the custody and control of the state penal system. Pet. App. 2a; *see Jones v. Cunningham*, 371 U.S. 236 (1963) (parolees, like prisoners, are under state custody); N.Y. COMP. CODES R. & REGS. tit. 9, § 8003.1(a) (2004) (same); *id.* § 8003.2 (listing conditions of parole release);

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3. The Florida law (*Johnson*), like the laws in six other states including Virginia (*Howard*), permanently disenfranchises ex-felons. Fla. Const. art. VI, § 4 (1968); *see* The Sentencing Project, *Felony Disenfranchisement Laws in the United States* at 3 (September 2004), at http://www. sentencingproject.org/pdfs/1046.pdf. In these states, ex-felons must obtain a pardon or other type of restoration of civil rights from the state's governor or from the state's parole or pardons board in order to vote. *See, e.g.*, Fla. Stat. ch. 940 (2004). In seven other states, including Washington (*Farrakhan*) and Tennessee (*Wesley*), only certain categories of ex-felons are permanently disenfranchised. *See Felony Disenfranchisement Laws in the United States* at 3. By one estimate, Washington's law denies the franchise to almost 33,000 ex-felons. *Developments in the Law: The Law of Prisons: VI. One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1949 (2002).

id. § 8003.3 (authorizing the imposition of special conditions of release upon parolees).

This distinction matters for purposes of determining whether the VRA applies to such laws, as the Second Circuit's ruling suggests. Its analysis of New York law is based, in large part, on the use of felon disenfranchisement as a penological tool, rather than a pure regulation of voting. The Second Circuit began by recognizing that states "possess primary authority for defining and enforcing the criminal law," explaining that "[i]f New York State uses disenfranchisement merely as a tool to punish people who violate its laws, the application of § 1973 to § 5-106 would upset 'the sensitive relation between federal and state criminal jurisdiction.'" Pet. App. 34a-35a (internal citation omitted); *see also id.* at 3a, 36a, 37a. For this reason, the court held, New York's felon disenfranchisement law cannot be conflated with other facially neutral voting rules. Pet. App. 34a.

While the New York statute undeniably dictates who can vote, its role as a punitive device, particularly when viewed in light of the states' constitutionally recognized "discretion to deny the vote to convicted felons," Pet. App. 35a (citing Section 2 of the Fourteenth Amendment), led the court to apply a plain statement analysis to determine whether the statute is clearly a "voting qualification . . . standard, practice, or procedure" that can deny or abridge a prisoner's "right . . . to vote" within the meaning of § 1973. 42 U.S.C. § 1973(a).[4] There are two uncertainties that could trigger the

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4. Section 1973(a) states:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

plain statement rule here: Whether a tool such as disenfranchisement used to punish serious law violators held in state custody can be considered primarily a "voting qualification" within the meaning of the VRA; and to what extent incarcerated felons retain a "right to vote" recognized under the VRA.[5] The court sought an unmistakably clear statement from Congress that it intended the VRA to protect the voting rights of incarcerated felons, but found none. Pet. App. 44a-47a.

To hold that the denial of voting rights to incarcerated felons is not a practice covered by the VRA, however, says little about whether voting by ex-felons is so covered. For example, in reviewing an earlier version of New York's felon disenfranchisement law that, like the law at issue in *Farrakhan*, disenfranchised ex-felons as well as incarcerated felons, the Second Circuit held that the provision was regulatory, rather then penological. *Green*, 380 F.2d at 450 ("depriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise'") (internal citation omitted). This difference raises the question of whether such a law would more likely be considered a "voting qualification" covered by the VRA than would New York's current law.

The in-custody distinction is also significant because the VRA was enacted to enforce the Reconstruction

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5. The Second Circuit's holding was phrased more generally, presumably because it had no reason to explore the difference between incarcerated and ex-felon disenfranchisement. Judge Cabranes' concurrence from the denial of rehearing *in banc* does note the significance of this distinction, though. *Muntaqim*, 2004 U.S. App. Lexis 20619, *1.

Amendments, and this Court has long held that impingement of the constitutional rights of incarcerated persons is subject to a lower standard of review than the rights of others. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("[I]ncarceration brings about the necessary withdrawal or limitation of many privileges and rights, . . . justified by the considerations underlying our penal system. The limitations on the exercise of constitutional rights arise . . . from the fact of incarceration and from valid penological objectives — including deterrence of crime, rehabilitation of prisoners, and institutional security.") (internal citations omitted); *Turner v. Safely*, 482 U.S. 78, 89 (1987); *see also Griffin v. Wisc.*, 483 U.S. 868, 874 (1987) ("[I]t is always true of probationers (as we have said it to be true of parolees) that they do not enjoy "the absolute liberty to which every citizen is entitled, but only . . . conditional liberty."). It is therefore questionable whether incarcerated felons in fact maintain the same constitutional voting rights as ex-felons, and thus whether the VRA would apply equally to both.

In sum, because the Washington law covers ex-felons and New York's does not, the Second Circuit's analysis — tethered as it is to the penological function of disenfranchising incarcerated felons — does not implicate the same concerns at issue in the Ninth Circuit's decision. And for the same reason, it is not at all evident that the Second Circuit, were it to consider a law disenfranchising ex-felons, would reach a result different than the Ninth Circuit. The circuit split identified by Petitioner is thus reconcilable, and not worthy of this Court's review.

2. Petitioner argues that certiorari should be granted because the Second Circuit has failed to properly apply the plain statement rule of *Gregory v. Ashcroft*. Even if his critique of the Second Circuit's decision were correct, which it is not, Petitioner would have established at most that the court misapplied a well-settled rule of law. This point does not warrant intervention by the Court. *See* Rule 10, Rules of the Supreme Court of the United States.

3. As already discussed, given that a majority of the active judges of the Second Circuit have indicated an interest in rehearing this case *in banc*, this Court should deny certiorari. In addition, in light of other ongoing judicial and legislative activity in this area, Supreme Court review of whether the VRA applies to felon disenfranchisement laws would be premature at this point. But should the Court nonetheless decide to address this issue, it would be better served by first considering broader disenfranchisement laws that cover ex-felons.

a. The lower courts are increasingly addressing the question of whether the VRA applies to felon disenfranchisement, which involves a complex intersection of voting rights, crime and punishment, state sovereignty, constitutional law, and political theory that would clearly benefit from further percolation. Such input is forthcoming, as the Eleventh Circuit sitting *en banc* is about to review whether felon disenfranchisement is covered by the VRA, and a majority of the active judges of the Second Circuit have indicated an interest in rehearing this case *in banc* if certiorari is denied. Regardless of outcome, this Court can only benefit from further consideration among the lower courts, especially since the panel opinions in the Ninth and Eleventh Circuits have given the question only cursory treatment

(a footnote in *Johnson*, 353 F.3d at 1306 n.27, and two paragraphs in *Farrakhan*, 338 F.3d at 1016).

b. Supreme Court review at this juncture also risks inhibiting further political developments at a time when states are migrating toward a moderate, consensus view to allow ex-felon voting, consistent with the recommendations of the National Commission on Federal Election Reform and the American Bar Association. *See* National Commission on Federal Election Reform, *Final Report of the Commission*, Ch. IV, at 45 (July 31, 2001); American Bar Association, *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, Standard 19-2.6(a) and Report at R-12 (3d ed. August 2003).[6] In keeping with this trend, over the past several years a number of bills have been introduced in Congress to allow ex-felon voting.[7] These bills, together with the impending expiration of provisions of the VRA, *see* 42 U.S.C. § 1973b(a)(8), will provide an opportunity for national hearings and debate on the topic. Given the pace and consistent direction of recent political developments, it would be highly advantageous to give the states and Congress more time to develop a political, rather than judicial, solution that will serve the states' penological goals while protecting their citizens' interests in electoral participation.

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6. Between 1996 and 2003, eleven states amended their felon disenfranchisement laws. Eight adopted less restrictive laws, two added restrictions on prisoner voting, and one added a restriction on probationer voting. *See* The Sentencing Project, *Legislative Changes on Felony Disenfranchisement, 1996-2003*, at 1 (Sept. 2003), at http://www.sentencingproject.org/pdfs/legchanges-report.pdf.

7. *See, e.g.*, Civic Participation and Rehabilitation Act of 2003, H.R. 259, 108th Cong. (2003); Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. (2003); Constitutional Protection of the Right to Vote Act, H.R. 2935, 108th Cong. (2003).

c. Should the Court nonetheless decide immediate judicial intervention is warranted, the orderly development of the law would be better served were this Court to first address the more extreme position on felon disenfranchisement taken by Washington, Florida, and other states. One such opportunity is currently before the Court. *See Locke v. Farrakhan*, No. 03-1597 (*petition for cert. filed* May 24, 2004). The Eleventh Circuit's *en banc* consideration of Florida's felon disenfranchisement law may present another vehicle. *See Johnson*, 377 F.3d 1163.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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